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NLRB Crackdown on Unions: Union Fines and Sympathy Strikes

I. INTRODUCTION

In two distinct areas of labor law, the National Labor Relations Board¹, with considerable court approval, has taken increasingly strict views toward unions in areas involving union fines in a strike setting and sympathy strikers. As a result of these seemingly minor changes in Board law in these areas, utilization of the union's most effective means of economic warfare against an employer—the strike—has been significantly weakened.

The importance of the strike in the history of the labor movement cannot be overstated. During the 19th century, strikes were the chief means of improving wages and working conditions.² Due to the violent strikes in the latter part of the century, a presidential commission to study the problems of strikes was formed in 1894.³ The commission suggested that employers should recognize and deal with labor organizations, with the expectation that if employers took labor into consultation at proper times, much of the severity of strikes could be tempered and the number of strikes reduced.⁴ Such suggestions signalled the beginnings of a variety of judicial and legislative attempts to regulate the employment relationship in the history of the American labor movement, and culminated in the enactment of the National Labor Relations Act.⁵

Of course, the utilization and characteristics of strikes have changed since the enactment of the NLRA as labor-management relations have matured. As experience with collective bargaining accumulates, employers and unions become more adept at peacefully resolving disputes. Presently it is as a last resort, for the most part, that unions strike in attempts to resolve disputes with employers. As one commentator has noted, the NLRA fosters collective bargaining and seeks to insure that employees, through organization, have an equal bargaining position. However, organization of

1. Hereinafter referred to as "the Board."

2. THE TWENTIETH CENTURY FUND, *HOW COLLECTIVE BARGAINING WORKS* 872 (1945).

3. C. MORRIS, *THE DEVELOPING LABOR LAW* 872 (1971).

4. *Id.* at 13.

5. Hereinafter referred to as "NLRA" and "the Act."

employees strengthens their bargaining position *chiefly* through their reserve power to exercise their aggregate economic strength by means of the strike.⁶

First, this comment will provide an overview of the development of Board and court decisions concerning union fines levied against employees who cross the picket lines, as well as those decisions impacting sympathy strikes. Secondly, recent Board pronouncements in these areas will be analyzed in terms of their effect upon the union's ability to exert economic pressure upon an employer through the use of a strike.

II. UNION FINES ON RESIGNING MEMBERS IN THE FACE OF A STRIKE: THE NEW RULES

Under section 7 of the NLRA, employees are guaranteed both the right to engage in concerted activities and the right to refrain from any or all such activities.⁷ Section 8(b)(1)(A) of the NLRA details the rights of individual employees with respect to labor organizations, and specifically provides that it is an unfair labor practice for a union to restrain or coerce employees in the exercise of the rights guaranteed in section 7 of the NLRA.⁸ A proviso to section 8(b)(1)(A) gives labor organizations the right to prescribe their own rules with respect to acquisition and retention of membership.⁹ In short, employees are free to join or refrain from joining a union under section 7,¹⁰ and a union, in turn, must respect the

6. Magruder, *Development of Collective Bargaining*, 50 HARV. L. REV. 1071 (1937) (emphasis supplied).

7. 29 U.S.C. §§ 151-186 (1976 & Supp. V 1981). Section 7 specifically states:

Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

29 U.S.C. § 157.

8. Section 8(b) provides:

It shall be an unfair labor practice for a labor organization or its agents . . . (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention or membership therein; . . .

29 U.S.C. § 158(b).

9. *Id.*

10. Section 8(a)(3) of the NLRA permits employers and unions to enter into agreements requiring employees to become members of the union on or after the thirtieth day of

individual's choice under section 8(b)(1)(A). Further, under the section 8(b)(1)(A) proviso, the union is granted certain privileges to establish its own rules for membership.

Against this background comes the body of law which has developed concerning these competing rights, and the Supreme Court's first discussion of the area of union fines in its 1967 decision in *NLRB v. Allis-Chalmers Manufacturing Co.*¹¹ In *Allis-Chalmers*, the Supreme Court held, in agreement with the Board, that a union does not restrain or coerce employees in violation of section 8(b)(1)(A) of the Act when it fines a member who crosses a picket line and returns to work during a strike.¹² The Court noted in reaching its holding, that national labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, employees have the most effective means of bargaining for improvement in wages, hours and working conditions. The Court reasoned that although the employee may disagree with many of the union's decisions, he is nonetheless bound by them since the majority-rule concept is unquestionably at the center of our federal labor policy.¹³ The Court reasoned further that an integral part of this federal labor policy has been the power of the union to protect against erosion of its status through reasonable discipline of members who violate rules and regulations governing membership.¹⁴ As the Court noted, "that power is particularly vital when the members engage in strikes," since "the economic strike against the employer is the

employment with the employer. An employee is not required, however, to become a full member of the union. The Supreme Court has defined the term "membership" as used in section 8(a)(3) as encompassing only a financial obligation limited to the payment of fees and dues. *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963). Section 8(a) provides, in pertinent part:

It shall be an unfair labor practice for an employer—

.....
(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, . . .

29 U.S.C. § 158(a).

11. 388 U.S. 175 (1967).

12. *Id.* at 178-89.

13. *Id.* at 180.

14. *Id.* at 181.

ultimate weapon in labor's arsenal for achieving agreement upon its desired terms."¹⁵ "The power to fine or expel strikebreakers," the Court concluded, "is essential if the union is to be an effective bargaining agent."¹⁶

In reviewing the legislative history of section 8(b)(1), the Court noted that the proviso to section 8(b)(1)(A)—reserving the right of a labor organization to prescribe its own rules with respect to acquisition and retention of membership—was introduced as an amendment on the Senate floor with the express statement that it was not the intent of the sponsors to regulate the internal affairs of unions.¹⁷ Significantly, the *Allis-Chalmers* Court expressly limited its holding to the presumption that the employees fined were union members.¹⁸ The effect of this decision was that in the face of a stiff fine, union members would be reluctant to abandon the picket line and return to work since the imposition of fines against those who returned to work had been adjudged a lawful method of discipline against strikebreakers.

The Supreme Court faced the issue of union fines again in 1972, in *NLRB v. Textile Workers Local 1029, Granite State Joint Board*.¹⁹ Although the *Allis-Chalmers* decision supported a union's right to discipline active members who crossed picket lines, it did not address the issue of a union's right to discipline those who resign from the union in order to cross the picket line. In *Granite State*, the Court answered this question, agreeing with the Board that a union could not fine employees who were no longer members.²⁰ In reaching this conclusion, the Supreme Court noted that when there was a "lawful dissolution of union-member relation, the union had no more control over the former member than it did over the man in the street."²¹ In *Granite State*, Justice Douglas observed that "neither the contract nor the Union's constitution or bylaws contained any provision defining or limiting the circumstances under which a member could resign."²² Several days before the contract between the employer and the union was to expire, a strike vote was taken during which the membership agreed to

15. *Id.*

16. *Id.* (quoting Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049 (1951)).

17. 388 U.S. at 184-85; S. REP. NO. 105, 80th Cong., 1st Sess. (1947).

18. *Allis-Chalmers*, 388 U.S. at 196-97.

19. 409 U.S. 213 (1972).

20. *Id.* at 217.

21. *Id.*

22. *Id.* at 214.

strike if no agreement was reached. Following the expiration of the contract, the parties could not reach an agreement, and the union struck the employer. Following the onset of the strike, a union meeting was held in which a majority of union members agreed that any member aiding or abetting the employer during the strike would be subject to a \$2,000 fine. During the strike, thirty-one members resigned their union membership, by letter, and crossed the picket line. The union assessed a \$2,000 fine upon each resigning member, and these fined members filed a charge with the NLRB alleging a violation of section 8(b)(1)(A) of the Act. The Board agreed that the fines were unlawful,²³ but the court of appeals denied enforcement of the Board's order.²⁴ Reversing, the Supreme Court declined to give weight, as had the First Circuit, to the fact that the resigning employees had participated in the vote to strike.²⁵ The Supreme Court noted that, "Events occurring after the calling of strike may have unsettling effects which could lead a member who voted in favor of a strike to change his mind."²⁶ The Supreme Court further noted that the strike in question was still in progress eighteen months after its inception, and that all but two of the resigning members had not resigned until after the sixth month of the strike.²⁷ Reasoning that the duration of the strike likely led to family hardship as well as increased likelihood of striker replacement by the employer, the Court concluded that the former members' participation in the strike vote had little importance.²⁸ Significantly, the *Granite State* Court specifically limited its holding to instances where there are no contractual restraints on a member's right to resign, and cautioned that it was not deciding to what extent the contractual relationship between union and member might curtail the freedom to resign.²⁹

One year later, in 1973, the Supreme Court was again called upon to decide the lawfulness of union fines assessed against resigning members. In *Booster Lodge No. 405 v. NLRB*,³⁰ the Court reviewed a determination that the union had violated section 8(b)(1)(A) of the NLRB by imposing \$450 fines upon each re-

23. *Granite State Joint Bd., Textile Workers Union of Am.*, 187 N.L.R.B. 636 (1970).

24. *NLRB v. Granite State Joint Bd., Textile Workers Union of Am.*, 446 F.2d 369 (1st Cir. 1971).

25. *Granite State*, 409 U.S. at 217.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Booster Lodge No. 405 v. NLRB*, 412 U.S. 84 (1973).

signing union member who crossed the picket line during a strike, despite a "Misconduct of Members" clause in the union's constitution that imposed an obligation to refrain from strikebreaking.³¹ The union admitted that neither its constitution nor its bylaws contained any specific prohibition on resignation. The Supreme Court, in affirming the District Court of Columbia Circuit's enforcement of the Board order,³² noted that the mere general prohibition against strikebreaking, as contained in the union's constitution, was insufficient to allow the union to justify its fine by construing a restriction on resignations as falling under the "Misconduct of Members" clause.³³ Again, the Court left open the question of the extent to which contractual restrictions on members' right to resign be limited under the NLRB expressly stating that it was not deciding the issue in reaching its holding.³⁴

As a result of this line of cases, unions regularly employed provisions in their constitutions and bylaws purporting to limit a member's right of resignation.³⁵ The legitimacy of such provisions was generally governed by the Supreme Court's 1969 decision in *Scofield v. NLRB*,³⁶ which defined the parameters of union enforcement of a disciplinary rule. In *Scofield*, which involved a union rule relating to production ceilings, the Court held that a disciplinary rule could only be enforced if the rule reflected a legitimate union interest, impaired no federal labor policy, and was reasonably enforced against members who were otherwise free to resign from the union to escape the rule.³⁷

Since the time of the Supreme Court's decision in *Scofield*, *Alis-Chalmers* and *Granite State*, the Board has carved out various rules regarding restrictions on resignations, and has held that any restriction on resignation must provide a meaningful period for the exercise of the right to refrain from union activity.³⁸ In *UAW and its Local No. 647 (General Electric Co.)*, the Board found that a

31. *Id.* at 89.

32. 459 F.2d 1143 (D.C. Cir. 1972).

33. *Booster Lodge*, 412 U.S. at 89.

34. *Id.* at 88.

35. 1 C. MORRIS, *THE DEVELOPING LABOR LAW* 169 (2d ed. 1983). See also Note, *A Union's Right to Control Strike-Period Resignations*, 85 COLUM. L. REV. 339, 342 n.19 (1985). As a practical matter, an employee who resigned union membership during a strike would still be required to tender fees and dues once the strike settled and the employer and union executed a new contract containing a union shop clause. See generally *supra* note 5.

36. 394 U.S. 423 (1969).

37. *Id.* at 436.

38. *UAW and its Local No. 647 (Gen. Elec. Co.)*, 197 N.L.R.B. 608 (1972).

ten-day escape period, coupled with a sixty-day waiting period for resignation to take effect was overly restrictive.³⁹ The Board has also held, in *Local 1384, United Auto Workers (Ex-Cell-O Corp.)*,⁴⁰ that a union attempting to impose a fine upon a member it claims has not effectively resigned bears the burden of producing evidence, as well as the burden of persuasion, to establish that the employee knew or had consented to the limitation of his right to resign.⁴¹

In a 1977 case, *Dalmo Victor I*,⁴² the Board found a section 8(b)(1)(A) violation in a union's fining of members who resigned and crossed the picket line during a strike despite a constitutional provision that prohibited resigning members from crossing the picket line unless they had resigned more than fourteen days before the strike commenced.⁴³ In the Board's view, the constitutional provision was not a restriction on resignation, but rather, an unlawful attempt to control the post-resignation conduct of members or former members.⁴⁴ The Ninth Circuit denied enforcement of the Board order, concluding that the union's constitutional provision was, in fact, meant as a restriction on a member's right to resign, and noted that the Board's categorization of the provision as a mere attempt to control post-resignation conduct was "hypertechnical."⁴⁵ The Ninth Circuit specifically noted that the union had asserted that the provision was enacted for the very purpose of imposing contractual restrictions on a member's right to resign.⁴⁶ The Ninth Circuit remanded the case to the Board for the purpose of deciding whether the provision, viewed as a restriction on resignations, was a *valid* restriction.⁴⁷ In 1982, pursuant to the remand, the Board issued a supplemental decision and order in which it defined the parameters for restrictions on resignations.⁴⁸ In its decision, the Board acknowledged the conflicting interests at stake between union and employee; namely, the employee's section

39. *Id.*

40. *Local 1384, UAW (Ex-Cell-O Corp.)*, 227 N.L.R.B. 1045 (1977).

41. *Id.* at 1049.

42. *Machinists Local 1327 (Dalmo Victor)*, 231 N.L.R.B. 719 (1977).

43. *Id.*

44. *Id.* at 720.

45. *NLRB v. Machinists Local 1327 (Dalmo Victor)*, 608 F.2d 1219, 1221 (9th Cir. 1979).

46. *Id.* at 1222.

47. *Id.*

48. *Machinists Local 1327 (Dalmo Victor)*, 263 N.L.R.B. 984 (1982), hereinafter referred to as *Dalmo Victor II*.

7 right to refrain from collective activity versus the union's interest in protecting employees it represents who have joined together in collective economic activity.⁴⁹ The Board concluded that reasonable rules governing the acquisition or retention of membership in the union, or resignation therefrom were necessary to protect the union's interest and to facilitate the orderly management of its affairs, particularly during periods when a strike is imminent or underway. As a result, the Board ruled that a union could impose reasonable time restrictions on the right of members to resign from the union.⁵⁰ The Board conceded that a union's responsible and operational effectiveness is a key component of national labor policy and enables the union to better represent the majority of its members in the collective-bargaining process.⁵¹

Notwithstanding these union interests, however, the Board went on to conclude that the restrictions imposed by the union in *Dalmo Victor* were unreasonable, and therefore violative of the NLRA.⁵² The Board noted that the union's rule of prohibiting resignations unless received fourteen days before the onset of a strike effectively limited union member resignation to nonstrike periods.⁵³ According to the Board, the Supreme Court's rationale in *Granite State*,⁵⁴ which noted the unsettling effects of a strike, including family hardship on a member, required the Board to reach only one conclusion: that a union member could not be prohibited from resigning at the very time he would most like to do so. As one commentator has noted, the right to resign cannot be confined to those few periods when the member is least likely to be disenchanted with his union.⁵⁵ This commentary goes to the heart of the issue. Put simply, members will most want to resign their union membership during strike times, so that they can cross the picket line and return to work free of union discipline. At the same time, unions need the power to discipline members if they choose to resign membership to cross a picket line and return to work, so as to be effectively able to call a strike, with certainty as to its support. If too many employees can freely cross the picket line, the employer may well be able to continue operations without the

49. *Id.* at 985.

50. *Id.*

51. *Id.*

52. *Id.* at 986.

53. *Id.*

54. See *supra* notes 24-28 and accompanying text.

55. Wellington, *Union Fines and Workers' Rights*, 85 YALE L.J. 1022, 1044 (1976).

strikers, and accordingly, withstand any pressure the union might attempt to bring to bear upon the employer.

In attempting to resolve this conflict between union and employee interests, the Board held that a union rule which limits a union member's right to resign to nonstrike periods constitutes an unreasonable restriction on a member's section 7 rights.⁵⁶ The Board then pronounced its own rule for what it would consider a valid restriction on resignations.⁵⁷ This rule allows union members to resign at any time, including times when a strike is in progress, but with resignations not taking effect for thirty days. Such a rule, the Board concluded, is a reasonable accommodation of the employees' desires to return to work during a strike and the union's responsibility to protect the interests of its remaining membership as well as to take care of administrative matters incident to the resignations.⁵⁸

Critics of the Board's thirty-day rule, beginning with the concurring opinion in *Dalmo Victor II* by Board Chairman Van De Water and Member Hunter, have questioned the Board's thirty-day cut-off.⁵⁹ There appears to be no particular significance to the time frame of thirty days, and indeed, the concurring opinion in *Dalmo Victor II* asks why ten days is too short, and thirty-one days too long.⁶⁰ As the concurring members of the Board note, an employer can and often does hire replacements immediately after a strike commences, and while a thirty-day waiting period, enforceable by substantial fines, may appear to be "reasonable," the real life dilemma created for the employee subjected to the rule is that his job may be long gone by the time he is able to take any meaningful steps to save it.⁶¹ This is so because a striking employee who is permanently replaced during an economic strike has reinstatement rights to his former position, but *only* upon the departure of the permanent replacement.⁶² Thus, once a strike commences, an em-

56. *Dalmo Victor II*, 263 N.L.R.B. at 986.

57. *Id.* at 987.

58. *Id.*

59. *Id.* at 991. Members Zimmerman and Fanning found a section 8(b)(1)(A) violation and thereafter pronounced the new 30-day rule; Member Hunter and Chairman Van de Water concurred in the finding of violation but specifically disagreed with the 30-day rule. For a detailed review of alternative suggestions to govern union resignations, see Comment, *Union Security and Union Members' Freedom to Resign: The National Labor Relations Board's Thirty-Day Rule In Dalmo Victor*, 14 TEX. TECH L. REV. 593, 611 (1983).

60. *Dalmo Victor II*, 263 N.L.R.B. at 991 n.45.

61. *Id.* at 991 n.46.

62. *Laidlaw Corp.*, 171 N.L.R.B. 1366, *enforced*, 414 F.2d 99 (7th Cir. 1969). An economic strike is one that is neither caused nor prolonged by an unfair labor practice on the

ployer may immediately replace workers permanently. An employee who chooses to wait thirty days for his resignation to take effect so as to avoid a union fine might well find, upon crossing the picket line to return to work, that he has been permanently replaced. Such an employee would then only be able to return to work if his replacement should happen to be fired or resign.

In yet another clarification of the matter, the Board, in 1984, backed away from the thirty-day rule in *Dalmo Victor II* and concluded in *International Association of Machinists, Local 1414 (Neufeld Porsche-Audi, Inc.)*,⁶³ that any restriction a union may impose on resignations is invalid and violative of section 8(b)(1)(A).⁶⁴ The Board noted that although the union has an interest in maintaining the solidarity, a rule restricting resignations nonetheless impairs fundamental policies embedded in the labor laws, an impairment impliedly prohibited, in the Board's view, by the Supreme Court's *Scofield* decision in which the Supreme Court had announced its test for the legitimacy of union disciplinary rules.⁶⁵ Noting that the Supreme Court had warned in *Scofield* that a union disciplinary rule would be valid only if it impaired no policy Congress had embedded in the labor laws, the Board found that a restriction on resignations impaired the section 7 right of employees to refrain from any or all protected concerted activities, which would include strikes and union membership.⁶⁶ The Board further noted that any effort to equate the institutional interests of a union in preserving strike solidarity and protecting striking members with the statutory rights of employees is inappropriate since such interests, no matter how legitimate, are insufficient to negate express statutory rights.⁶⁷ It accordingly overruled its previous holding in *Dalmo Victor II*, to the extent that it advocated a thirty-day holding period for resignations to take effect.

At about the same time that the *Machinists Local 1414* case was before the Board, the Seventh Circuit was involved in deciding yet

part of the employer. An unfair labor practice strike, in contrast, is activity initiated in whole or in part in response to unfair labor practices committed by the employer. *NLRB v. Pecheur Lozenge Co.*, 209 F.2d 393 (2d Cir. 1953), *cert. denied*, 347 U.S. 953 (1954). Strikers who have been engaged in an unfair labor practice strike are entitled to reinstatement to their former jobs even if the employer has hired permanent replacements. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938).

63. 270 N.L.R.B. 1330 (1984).

64. *Id.* at 1336.

65. *Id.* at 1333. See *supra* note 36 and accompanying text.

66. *Machinists, Local 1414*, 270 N.L.R.B. at 1333.

67. *Id.* at 1336.

another restriction on resignations case. In this 1983 case, *Pattern-Makers' League of North America (Rockford-Beloit Jobbers Association)*,⁶⁸ the Seventh Circuit held, in agreement with the Board,⁶⁹ that a blanket provision outlawing resignation during a strike or at a time when a strike appeared imminent was an invalid restriction on resignations, and that the fines assessed against employees who resigned during the time of the strike to cross the picket line (equal to the equivalent of each crossing employee's earnings during the strike), were violative of section 8(b)(1)(A) of the Act.⁷⁰ The Seventh Circuit noted the Board's analysis in *Dalmo Victor II*, and applied a similar analysis to the *Pattern Makers* facts, concluding that an attempt to restrict resignations during strike periods was patently invalid, since it frustrated the overriding policy of labor law that employees should be free to choose whether to engage in concerted activities.⁷¹ The Seventh Circuit, citing the Supreme Court in *Granite State*,⁷² added that an employee's section 7 rights were not lost by a union's plea for solidarity nor by its pressures for conformity and submission to its authority.

Meanwhile, in the Ninth Circuit, the Board's *Dalmo Victor II* decision was under scrutiny. The Ninth Circuit denied enforcement of the Board order, and concluded that the union's rule prohibiting resignations within fourteen days of the strike or thereafter was a reasonable union disciplinary rule under the *Scofield* test.⁷³ The Ninth Circuit found that although employees concededly had a section 7 right to resign, an unfettered right to resign during a strike was serious threat to a union's viability, in that those who escaped punishment by resigning and crossing the picket line would inspire others to follow suit, eventually setting off a chain reaction which could break the union, and ultimately give the employer greater power to set the terms and conditions of employment.⁷⁴ The Ninth Circuit further noted that the proviso to section 8(b)(1)(A), allowing a union to prescribe rules for membership, had been "embedded in the labor laws" for just as long as the section 7 right of an employee to refrain from union activities.⁷⁵

68. 724 F.2d 57 (7th Cir. 1983).

69. *Pattern Makers' League of N. Am. (Rockford-Beloit Jobbers Ass'n)*, 265 N.L.R.B. 1332 (1982).

70. *Pattern Makers*, 724 F.2d at 59.

71. *Id.* at 60.

72. *Granite State*, 409 U.S. at 218.

73. *Machinists, Local 1327 (Dalmo Victor) v. NLRB*, 725 F.2d 1212 (9th Cir. 1984).

74. *Id.* at 1217.

75. *Id.*

The Supreme Court, in 1985, took advantage of an opportunity to address the issue of union fines on resigning members in the *Pattern Makers* case.⁷⁶ In affirming the Board and the Seventh Circuit in *Pattern Makers*,⁷⁷ the Supreme Court agreed that the union had violated section 8(b)(1)(A) of the Act by imposing fines on members who had resigned their union membership during a strike, despite a constitutional amendment prohibiting such resignations during strike periods. The Supreme Court initially noted that because of the Board's special competence in the field of labor relations, its interpretation of the Act is accorded substantial deference.⁷⁸ It saw its task, then, as merely deciding whether the Board's construction of section 8(b)(1)(A) in *Pattern Makers* was reasonable.⁷⁹ The Court then went on to conclude that the Board's construction was reasonable.⁸⁰

The Supreme Court's *Pattern Makers* decision settled the controversy between the conflicting statutory interest of an employee's section 7 right to resign and a union's section 8(b)(1)(A) right to prescribe rules for members by declaring that the section 8(b)(1)(A) proviso was intended to protect union rules involving admission and expulsion, and *not* the employee's right to resign union membership.⁸¹ The Court rejected the union's argument that the legislative history required a finding that Congress made a considered decision *not* to protect a union member's right to resign as demonstrated by its failure to include proposed language to that effect in the Taft-Hartley amendments to the NLRA.⁸² The *Pattern Makers* Court noted that the "right to resign" was apparently included in an original House bill to protect workers unable to resign because of closed shop agreements,⁸³ and reasoned that since

76. *Pattern Makers' League of N. Am. v. NLRB*, 105 S. Ct. 3064 (1985). Certiorari had been granted at 105 S. Ct. 79 (1984) to resolve the conflict between the Seventh and Ninth Circuits.

77. Justice Powell, writing the majority opinion, was joined by Chief Justice Burger and Justices Rehnquist and O'Connor; Justice White filed a concurring opinion; Justice Blackmun dissented and filed an opinion in which Justices Brennan and Marshall joined; Justice Stevens dissented and filed an opinion.

78. *Pattern Makers*, 105 S. Ct. at 3068.

79. *Id.*

80. *Id.* at 3069.

81. *Id.* at 3072-73.

82. *Id.* at 3073.

83. A closed shop, now prohibited by the Taft-Hartley Act, required employees to be union members prior to the onset of employment with an employer. A union shop requires employees to become members of the union on or after the thirtieth day of employment with the employer. "Membership" encompasses only a financial obligation limited to the payment of union fees and dues. See *supra* note 5.

the Taft-Hartley Act outlawed the closed shop, Congress thought it unnecessary to explicitly preserve the right to resign.⁸⁴ The Court further concluded that the inconsistency between union restrictions on the right to resign and the policy of voluntary unionism implicit in section 8(a)(3), were ample support for the Board's finding a violation on the *Pattern Makers* facts.⁸⁵

Finally, in reiterating its reluctance to overrule the Board, the Supreme Court noted that it had previously yielded to Board decisions on the issue in question in which the Board had consistently construed section 8(b)(1)(A) as prohibiting the imposition of fines on employees who had tendered resignations which were invalid under a union constitution.⁸⁶ In a concurring opinion, Justice White added that where, as in the case of section 8(b)(1)(A), "the statutory language is rationally susceptible to contrary readings, and the search for congressional intent is unenlightening, deference to the Board is not only appropriate but necessary."⁸⁷ Justice White noted that "[f]or the Act to be administered with the necessary flexibility and responsiveness to the 'actualities of industrial relations,' the primary responsibility for construing its general provisions must be with the Board, and that is where Congress has placed it."⁸⁸

Justice Blackmun's dissenting opinion reviewed the legislative history of the Taft-Hartley Act,⁸⁹ and concluded that Congress, in enacting 8(b)(1)(A) and other sections, did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's *employment* status.⁹⁰ In Justice Blackmun's view, a rule prohibiting resignations neither coerces a worker to become a union member nor affects an employee's status as an *employee under the Act*, and thus, should be permitted under section 7 since the Act intended to interfere with the internal affairs of unions only where a union's rules affected an employee's status as an employee. Addressing the majority's argument that the 8(b)(1)(A) proviso was only intended to give unions the right to regulate admission and expulsion but not resignation, Justice Blackmun

84. 105 S. Ct. at 3073.

85. *Id.* at 3070.

86. *Id.* at 3075-76.

87. *Id.* at 3076.

88. *Id.*, citing *NLRB v. Steelworkers*, 357 U.S. 357, 362-64 (1958).

89. *Pattern Makers*, 105 S. Ct. at 3077.

90. *Id.* at 3079.

pointed out that the majority provided no explanation for this conclusion.⁹¹ He also rejected the majority's view that the rule restricting resignations impairs a federal labor policy mandating voluntary unionism implicit in section 8(a)(3). According to Justice Blackmun:

"[V]oluntary unionism" does not require that an employee who has freely chosen to join a union and retain his membership therein, in full knowledge that by those decisions he has accepted specified obligations to other members, nevertheless has insured a federally protected right to disregard those obligations at will, regardless of the acts of others taken in reliance on them.⁹²

Justice Blackmun stated that the majority took a misplaced paternalistic view of the union member by treating him as an incompetent whose promise [not to resign] could not be enforced against him because "it was presumed not to have been made with an awareness of the consequences of the promise," and that this paternalism threatened the power to act collectively; a power central to the Act.⁹³ Justice Blackmun added that this promise was merely a *quid pro quo* for the benefits that member had "received as a result of his decision to band together with . . . fellow workers and to join collective bargaining."⁹⁴ Finally, Justice Blackmun noted the harsh reality that before workers strike, it is reasonable that they have some assurance that collectively they will have the means to withstand the pressures the employer is able lawfully to impose on them, and noted further that a member's decision to return to work could have, as in the case before the Court, a snowballing effect causing the strike to lose its effectiveness.⁹⁵

Justice Stevens, in his separate dissent, concluded that the legislative history, coupled with the plain language in the proviso to section 8(b)(1)(A) evidenced that the right to refrain from collective activity did not encompass the right to resign.⁹⁶

The five-four split in the Supreme Court's *Pattern Makers* decision, the reluctance of prior Supreme Courts to express their view on the right to resign faced with the opportunity in similar cases,⁹⁷

91. *Id.*

92. *Id.* at 3081-82.

93. *Id.* at 3082.

94. *Id.* at 3083.

95. *Id.*

96. *Id.* at 3085.

97. In *Allis-Chalmers*, the Supreme Court specifically limited its holding to the presumption that the employees fined were union members. In both *Granite State* and *Booster Lodge*, the Supreme Court noted that it was not deciding the extent to which a contractual

the variety of commentators taking completely opposing views on the issue,⁹⁸ and the Board's own change of view on the matter, all point to the conclusion that the *Pattern Makers* choice was a difficult one, amply supported by compelling interests on both sides. In answering the issue in favor of the employee, the *Pattern Makers* majority chose to ground its opinion in its obligation to defer to the Board's expertise rather than to make the difficult choice between the interests of the employee and those of the union. Whether viewed as a reasonable attempt to settle eighteen years of cases since *Allis-Chalmers* involving union fining of picket-line crossers, or as an aberration, there can be no doubt that the decision's impact on the usefulness of a strike by unions to achieve their goals is significant. As the dissent by Justice Blackmun noted, strikes are costly,⁹⁹ and no union is going to incur the expenses of strike benefits and the risk of severe financial loss to its members should the strike be lengthy, in instances where it suspects that it will have too many defectors to make the strike worthwhile. Without the trump card of union fines to instill in workers an incentive not to cross the picket line, there is not much left in the union's hand, short of peer pressure, to hold the strike together. Only time will tell whether unions, faced with these constraints under the *Pattern Makers* holding, will abandon the strike strategy in favor of other means to achieve their goals.

As a result of the Court's decision, unions may be forced to accept whatever offers an employer makes at the bargaining table, knowing that the strike is no longer a viable alternative to protecting the employer's position.

relationship between union and member might curtail the freedom to resign. See *supra* notes 13, 29 & 34 and accompanying text.

98. Millan, *Disciplinary Developments Under §8(b)(1)(A) of the National Labor Relations Act*, 20 LOY. L. REV. 245 (1974) (advocating a rule that resignations should not be effective for sixty to ninety days); Wellington, *Union Fines and Workers' Rights*, 85 YALE L.J. 1022 (1976) (advocating a finding of violation where union members are not fully informed of their right to limit membership to the payment of dues and initiation fees only); Comment, *Union Security and Union Members' Freedom to Resign: The National Labor Relations Board's Thirty-Day Rule in Dalmo Victor*, 14 TEX. TECH L. REV. 593 (1983) (supporting the rule that resignations should not be effective until 30 days after tender); Ogden, *Dalmo-Victor: A Troubled Sleep Deserves a Hershey Kiss*, 35 LAB. L.J. 374 (1984) (proposing that the Board adopt the standard enunciated in *NLRB v. Hershey Foods Corp.*, 513 F.2d 1083 (9th Cir. 1975) (right to resign only for dues paying members)); Note, *A Union's Right to Control Strike-Period Resignations*, 85 COLUM. L. REV. 339 (1985) (recommending the right to resign only before a strike vote is taken).

99. *Pattern Makers*, 105 S. Ct. at 3083.

III. THE RIGHT TO HONOR ANOTHER'S PICKET LINE — THE BOARD'S NEW RULING ON BROAD NO-STRIKE CLAUSES

An integral part of any strike is persuading other employees to withhold their services and join in making the strike more effective, and it cannot be denied that respect for the integrity of the picket line may well be the source of strength of the whole collective bargaining process in which every union member has a legitimate and protected economic interest.¹⁰⁰

The Board has consistently held that the right to honor another union's picket line (known as a sympathy strike) is an employee right created and protected by section 7 of the Act.¹⁰¹ Accordingly, an employee who in the course of his duties as a truck driver, for example, encountered a picket line at a delivery stop and refused to cross it, could not be disciplined by his employer for this refusal.¹⁰² The freedom to refuse to cross a picket line, however, can be restricted by an agreement between an employer and a union. In *NLRB v. Rockaway News Supply Co.*,¹⁰³ the Supreme Court recognized that an employer and union may include a provision in their contract prohibiting an employee from refusing to cross a picket line if they so agree.¹⁰⁴

Beginning with the Supreme Court's decision on the use of contractual clauses concerning picket line rights in *Rockaway*, a line of cases developed with respect to whether a broad no-strike clause, not specifically mentioning sympathy strikes, could proscribe an employee's right to refuse to cross another union's picket line. The issue arose because of traditional notions that a union's promise not to strike was given in exchange for the employer's promise to arbitrate.¹⁰⁵ The sympathy strike, however, does not involve contractual disputes under the sympathy striker's *own* contract, and

100. *NLRB v. Southern Calif. Edison*, 646 F.2d 1352, 1363 (9th Cir. 1981).

101. See, e.g., *Business Services by Manpower, Inc.*, 272 N.L.R.B. No. 119 (1984); *Torrington Constr. Co.*, 235 N.L.R.B. 1540 (1978); *Redwing Carriers*, 137 N.L.R.B. 1545 (1962).

102. 29 U.S.C. §§ 151-186 (1976 & Supp. V 1981). Section 8 of the NLRA states in part:

(a) Unfair labor practice by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7.

29 U.S.C. § 158.

103. 345 U.S. 71 (1953).

104. *Id.* at 79. In *Rockaway*, the Supreme Court found a sympathy strike unprotected by the NLRA because of its finding that the union had effectively waived their rights to honor picket lines of another union in contract negotiations.

105. *Boys Market, Inc. v. Retail Clerks, Local 770*, 398 U.S. 235 (1970).

generally is not arbitrable. Thus, the question is whether a broad no-strike clause could encompass a prohibition against sympathy strikes. As the Board has explained, a problem arises concerning sympathy strikes because the grievance and arbitration machinery in any contract is normally designed to cover only disputes arising out of an interpretation or application of the sympathy striker's *own* contract.¹⁰⁶ Accordingly, grievance and arbitration clauses can hardly be utilized to resolve disputes between persons who are strangers to the sympathy strikers' contract. Thus, sympathy strikers are normally excluded from the ambit of no-strike clauses because such clauses are limited in their application to the scope of contract grievance machinery.¹⁰⁷

Even in the absence of an express no-strike provision, the Supreme Court has held that an undertaking not to strike would be implied only where the strike was over issues which were subject to arbitration.¹⁰⁸ This position is commonly known as the common law doctrine of coterminous interpretation.¹⁰⁹

In *Gary-Hobart Water Corp.*,¹¹⁰ the Board held that a broad no-strike clause did not constitute a waiver of the union's right to honor another union's picket line. In reaching its conclusion, the Board noted that while statutory rights may be waived, the Board and the courts have repeatedly emphasized that such waivers will not be readily inferred. Instead, there must be a clear and unmistakable showing that waiver occurred.¹¹¹ The Board pointed out that it is fundamental that the right to strike is guaranteed by the Act, and noted that this is so, whether the strike is for economic reasons, for the purposes of improving working conditions, or for the mutual aid and protection of employee-members of another union.¹¹² The Board extended this reasoning to conclude that the right to engage in a sympathy strike is also protected, but again warned that waiver of such statutory rights would not be readily

106. *W-I Canteen Serv. Inc.*, 238 N.L.R.B. 609, 613 (1978).

107. *Id.* at 613.

108. *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368 (1974).

109. *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957).

110. 210 N.L.R.B. 742, *enforced*, 511 F.2d 284 (7th Cir.), *cert. denied*, 423 U.S. 925 (1975).

111. *Gary-Hobart*, 210 N.L.R.B. at 744, *citing* *Timkin Roller Bearing Co. v. NLRB*, 325 F.2d 745 (6th Cir. 1963), *cert. denied*, 376 U.S. 971 (1964); *Rockwell-Standard Corp., Transmission & Axle Div., Forge Div.*, 166 N.L.R.B. 124, *enforced*, 410 F.2d 953 (6th Cir. 1969); *The Fafnir Bearing Co.*, 146 N.L.R.B. 1582 (1964); *Beacon Pierce Dyeing and Finishing Co., Inc.*, 121 N.L.R.B. 953 (1958).

112. *Gary-Hobart*, 210 N.L.R.B. at 744.

inferred.¹¹³

In support of its conclusion, the Board cited the Supreme Court's decision in *Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Lucas Flour Co.*¹¹⁴ There, the Supreme Court indicated that no-strike provisions would not be enforced where the subject of the dispute was not covered by the grievance-arbitration procedure.¹¹⁵ The Supreme Court in *Lucas Flour* further added that a strike to settle a dispute, which a collective-bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration, constitutes a violation of the agreement. Such a no-strike agreement, the Court announced, is not to be implied beyond the area which has been agreed will be exclusively covered by compulsory arbitration.

In *Buffalo Forge Co. v. Steelworkers*,¹¹⁶ the Supreme Court concluded that a federal court may not enjoin a sympathy strike pending the outcome of arbitration concerning whether or not the strike is prohibited by a no-strike provision in the labor contract. In reaching its holding, the Court cited its decision in *Boys Markets, Inc. v. Retail Clerks, Local 770*,¹¹⁷ where it had noted that a no-strike clause is the *quid pro quo* for an extensive arbitration clause.

Notwithstanding the *quid pro quo* equation in *Boys Market*, the Supreme Court in *Buffalo Forge* noted that a *sympathy* strike was involved and that the parties had agreed that the strike was not over any dispute between union and employer even remotely subject to the arbitration provisions of the contract.¹¹⁸ The Supreme Court further noted that the sympathy strike at issue was in support of sister unions negotiating with the employer, and that neither its causes nor the issue underlying it was subject to the settlement procedures provided by the contract between the employer and the union.¹¹⁹ The Court reasoned that since a sympathy strike had neither the purpose nor the effect of avoiding an obligation to arbitrate, the *quid pro quo* for which the parties had bargained was not infringed upon.¹²⁰ The Court warned in dicta,

113. *Id.*

114. 369 U.S. 95 (1962).

115. *Id.* at 106.

116. 428 U.S. 397 (1976).

117. 398 U.S. 235 (1970).

118. *Buffalo Forge*, 428 U.S. at 407.

119. *Id.* at 407-08.

120. *Id.* at 408.

moreover, that to the extent that other courts had assumed that a mandatory arbitration clause implied a commitment not to engage in sympathy strikes, they were in error.¹²¹

In *C. K. Smith & Co.*,¹²² the Board faced the issue of whether a sympathy strike was prohibited by a no-strike clause which provided, "there shall be no strike, work stoppage or interruption of work during the term of the Agreement"¹²³ The Board concluded that this contractual language was insufficient to reveal a waiver of the right to strike in sympathy with other employees.¹²⁴ In cases following *C. K. Smith*, the Board consistently held that broad no-strike clauses would not prohibit sympathy strikes.¹²⁵

Typically, the Board has examined the bargaining history of the parties in determining whether employees have waived their right to engage in sympathy strikes. In *St. Regis Paper Co.*,¹²⁶ the Board found that the overall bargaining history pointed decisively to a "conscious waiver of the right to engage in sympathy strikes." In reaching this decision, the Board noted that the union, one of a number of unions at the employer's paper mill, had repeatedly crossed picket lines of the other locals in prior years, under the assumption that they were bound by a broad no-strike clause.

In *W-I Canteen Service, Inc.*,¹²⁷ the Board found a discharge of sympathy strikers unlawful where the sympathy strikers' labor contract contained the following no-strike clause:

The Company and the Union agree that there will be no strike or lockout during the life of this Agreement so long as the Company and the Union abide by the terms of this Agreement or submit to arbitration any differences which may arise which are not covered by this Agreement.¹²⁸

Additionally, the contract contained a provision that the employer would not require the employees to cross picket lines at the premises of *any other* company.¹²⁹ The sympathy strikers in question had respected the picket line of another local union at their own

121. *Id.* at 408 n.10.

122. *N.L.R.B. v. C.K. Smith & Co.*, 227 N.L.R.B. 1061 (1977), *enforced*, 569 F.2d 162 (1st Cir. 1978).

123. 227 N.L.R.B. at 1073.

124. *W-I Canteen Serv. Inc. v. N.L.R.B.*, 606 F.2d 738 (7th Cir. 1979).

125. See, e.g., *United States Steel Corp.*, 264 N.L.R.B. 76 (1982); *Amcar Div., ACF Indus. Inc.*, 247 N.L.R.B. 1056 (1980); *Union Boiler Co.*, 245 N.L.R.B. 719 (1979); *Chevron U.S.A., Inc.*, 244 N.L.R.B. 1081 (1979); *Daniel Constr. Co., Inc.*, 239 N.L.R.B. 1335 (1979).

126. 253 N.L.R.B. 1224, 1229 (1981).

127. 238 N.L.R.B. 609 (1978).

128. *Id.* at 610.

129. *Id.* at 614.

place of employment, and the Board found a violation, noting that no explicit waiver of the right to engage in sympathy strikes had been made.¹³⁰ The Court of Appeals for the Seventh Circuit disagreed, concluding that the picket line permission clause which permitted employees to honor picket lines *at other companies' premises* brought one to the natural conclusion that sympathy strikes were prohibited at the employer's *own* premises.¹³¹ The court noted that when the no-strike clause was first drafted, the NLRB had not yet enunciated its rule that broad no-strike clauses did not waive the right to engage in sympathy strikes. Further, evidence of defeated proposals during negotiations concerning the right to engage in sympathy strikes, coupled with express provisions on the subject of sympathy strikes, provided sufficient evidence to satisfy the court that the union had waived its right to honor another local's picket line whether at the other company's premises or at the employer's premises.¹³²

The circuit courts have taken a variety of positions concerning the effect of a broad no-strike clause on an employee's right to honor another picket line. Prior to the *W-I Canteen Service* case, the Seventh Circuit reached a similar conclusion in *NLRB v. Keller-Crescent Co.*¹³³ In *Keller-Crescent*, the court concluded that the employer could suspend employees who had honored a picket line of another union at the employer's premises, where the sympathy strikers were covered by a broad no-strike clause, and a clause that specifically permitted employees to honor only the picket lines erected by locals of their own international union.¹³⁴ The Seventh Circuit noted in *Keller-Crescent* that the picket line clause permitted the court to distinguish the facts in *Keller-Crescent* from prior Board and court holdings permitting sympathy strikes despite no-strike clauses. The *Keller-Crescent* court also found the employer's efforts to submit the dispute to arbitration to be a significant consideration.¹³⁵

More recently, in *United States Steel Corp. v. NLRB*,¹³⁶ the Seventh Circuit held that where a broad no-strike clause is functionally independent of an arbitration clause in a labor contract,

130. *Id.* at 616.

131. *W-I Canteen Serv. Inc.*, 606 F.2d 738 (7th Cir. 1979).

132. *Id.* at 746-47.

133. 538 F.2d 1291 (7th Cir. 1976).

134. *Id.*

135. *Id.* at 1299.

136. 711 F.2d 772 (7th Cir. 1983).

the no-strike clause constitutes a clear and unmistakable waiver of an employee's right to engage in a sympathy strike. In reaching this conclusion, the Seventh Circuit noted that the bargaining history revealed that the no-strike obligation had been given because of the parties' common interest in achieving uninterrupted plant operations to combat dire foreign competition, rather than as an exchange for the duty on the part of the employer to arbitrate.¹³⁷

Beyond these cases, the Seventh Circuit has not gone so far as to suggest that a broad no-strike clause, standing alone, could prohibit sympathy strikes. The District of Columbia Circuit, however, has so held. In *News Union of Baltimore v. NLRB*,¹³⁸ the union had petitioned the court to set aside a Board order dismissing a complaint against the employer for locking out employees who had honored another union's picket line at the employer's plant. The sympathy strikers, who were members of the Teamsters, had a contract with the employer which provided that the union and its members would not, during the life of the contract, take part in any strike, sit down, picketing or other curtailment or restricting of the delivery of the companies' newspapers until the grievance procedure had been exhausted.¹³⁹ The Board found the lockout permissible, and thus dismissed the complaint, noting that inasmuch as a waiver of the right to engage in a sympathy strike had been made by the union, the sympathy strike was unprotected.¹⁴⁰ The Board found a waiver by examining the bargaining history of the parties. Specifically, the Board found that the parties had interpreted the broad no-strike clause to prohibit sympathy strikes. Evidence existed that the union had made a contract proposal seeking the right to engage in sympathy strikes that had been rejected by the employer, and later abandoned by the union.¹⁴¹

The District of Columbia Court focused on the language of the no-strike clause itself, however, in affirming the Board's position. The court rejected the union's argument that language which prohibits any strike should not be read as prohibiting sympathy strikes. It further noted that the practical relationship between work stoppages and the honoring of picket lines is so well understood in the industrial climate that a clause of this kind, using only the word "strike," includes plant suspensions resulting from refus-

137. *Id.*

138. 393 F.2d 673 (D.C. Cir. 1968).

139. *Id.* at 676-77 n.4.

140. *The Hearst Corporation, News Am. Div.*, 161 N.L.R.B. 1405 (1966).

141. *Id.* at 1416.

als to report for work across picket lines.¹⁴² The court thus held that a broad no-strike clause could prohibit sympathy strikes. The District of Columbia Court has not again spoken on the issue since this 1968 case.

The Eighth Circuit has also taken the view that a broad no-strike clause can prohibit sympathy strikes.¹⁴³ In *Iowa Beef Processors*,¹⁴⁴ the Eighth Circuit held that a broad no-strike clause coupled with a clause requiring the union to promptly order its members to resume their normal duties notwithstanding the existence of *any* picket line, and statements by union officials to sympathy striker members that their strike was unauthorized, evidenced that a sympathy strike was prohibited under the parties' contract. The Eighth Circuit deemed it immaterial that the arbitration machinery could not resolve the issues underlying the sympathy strike.¹⁴⁵

The First Circuit addressed the sympathy strike issue in *NLRB v. C. K. Smith & Co.*,¹⁴⁶ where it held, in agreement with the Board, that a no-strike clause which prohibits "any strike" does not rise to the level of a clear and unmistakable waiver of the right to engage in sympathy strikes.

The Tenth Circuit has also held that a broad no-strike clause will not prohibit a sympathy strike, absent a clear and unmistakable waiver.¹⁴⁷

The Third Circuit took its opportunity to speak on the issue in *Delaware Coca-Cola Bottling Co. v. Teamsters Local 326*.¹⁴⁸ In that case, an action was brought by the employer under section 301 of the NLRA¹⁴⁹ seeking damages for an alleged breach of contract arising from the union's actions in honoring a picket line of an-

142. *News Union*, 393 F.2d at 677.

143. *Montana-Dakota Utils. Co. v. N.L.R.B.*, 455 F.2d 1088 (8th Cir. 1972).

144. *Iowa Beef Processors, Inc. v. Amalgamated Meat Cutters & Butcher Workmen, Local Union No. 1196*, 597 F.2d 1138 (8th Cir.), *cert. denied*, 444 U.S. 840 (1979).

145. 597 F.2d at 1145.

146. 569 F.2d 162 (1st Cir.), *cert. denied*, 436 U.S. 957 (1978). *See supra* notes 118-19 and accompanying text.

147. *NLRB v. Gould, Inc.*, 638 F.2d 159 (10th Cir. 1980), *cert. denied*, 452 U.S. 930 (1981).

148. 624 F.2d 1182 (3d Cir. 1980).

149. 29 U.S.C. § 185(a) (1976). Section 301(a) states in part:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in the Act, or between any such labor organization may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 301(a), 29 U.S.C. § 185(a) (1976).

other local at the employer's plant, despite a no-strike clause.¹⁵⁰ The United States District Court for the District of Delaware awarded damages to the employer.¹⁵¹ The Third Circuit reversed, applying the coterminous interpretation theory to reach its conclusion.¹⁵² The court noted that under this theory, it is proper to presume that the no-strike clause is not broader than the arbitration clause, and thus where the sympathy strikers cannot arbitrate the subject matter of the primary dispute, a generally worded no-strike clause does not bar the sympathy strike.¹⁵³

In further support of its conclusion, the Third Circuit analogized its decision to the Supreme Court's decision in *Mastro Plastics Corp. v. NLRB*.¹⁵⁴ In *Mastro Plastics*, the Supreme Court had concluded that a broad, general no-strike clause did not waive the right to engage in unfair labor practice strikes (strikes to protest acts of the employer which would violate the NLRA).¹⁵⁵ The Supreme Court noted in that case that the contract, taken as a whole, dealt with the economic relations between the employees and the employer concerning wages, hours, and working conditions, and thus, in effect, the no-strike clause was a promise by the union not to strike over matters covered by the contract, not to refrain from striking over unfair labor practices of the employer.¹⁵⁶ The Third Circuit applied the Supreme Court's rationale in *Mastro Plastics*, concerning a no-strike clause in an unfair labor practice strike setting, to the sympathy strike setting in *Delaware Coca-Cola*. Accordingly, the Third Circuit held that a broad no-strike clause cannot constitute a clear and unmistakable waiver of the right to sympathy strike, since the underlying issue in the primary strike

150. 624 F.2d at 1183-84. The no-strike clause provided:

Section 1. The Union will not cause nor will any member of the bargaining unit take part in any strike, sit-down, stay-in, or slow down in any operation of the Company or any curtailment of work or restriction of service or interference with the operation of the Company or any picketing or patrolling during the term of this Agreement.

.....

Section 3. The provisions of this Article, other than as mentioned above, shall not be subject to grievance or arbitration, for the purpose of assessing damages or securing specific performance, or any other matter, such matters of law being determinable and enforceable in the courts.

Id.

151. 474 F. Supp. 777 (D. Del. 1979).

152. *Delaware Coca-Cola*, 624 F.2d at 1187. The coterminous interpretation theory is discussed *supra* notes 104-05 and accompanying text.

153. 624 F.2d at 1187.

154. 350 U.S. 270 (1956).

155. *Id.*

156. *Id.* at 281-83.

would not be subject to arbitration under the sympathy strikers' own contract.¹⁵⁷

In *NLRB v. Southern California Edison Co.*,¹⁵⁸ the Ninth Circuit took a similar view to that of the Third Circuit with respect to a broad no-strike clause. The Ninth Circuit enforced a Board order¹⁵⁹ which concluded that the employer had unlawfully suspended an employee and threatened to discipline others after the employees' refusal to cross the picket line of a sister local at the employer's plant.¹⁶⁰ The court concluded that the discipline and threats of discipline were unlawful, noting that a broad no-strike clause would not prohibit sympathy strikes where although there existed some evidence of a waiver of this right, it was insufficient to amount to a clear and unmistakable waiver.¹⁶¹ The court deferred to the Board's finding that there had been no clear waiver despite the union's unsuccessful attempts to add language to the contract seeking the right to honor stranger picket lines.¹⁶² In concluding that no waiver was present, the Board noted that the employer and union had a thirty-year history of not requiring employees to cross strangers' picket lines whenever it was possible to delay the work until a later time, and never requiring an employee to cross a picket line where there was a danger of physical violence.¹⁶³ In view of this, the Board concluded, and the Ninth Circuit agreed, that no waiver could be found.

In summary, although the District of Columbia, and Eighth Circuit courts have taken the absolute view of a broad no-strike clause as prohibiting sympathy strikes,¹⁶⁴ and the Seventh Circuit has taken an intermediate position, the Board and the remainder of circuit courts that have addressed the issue have consistently taken the opposing view. Very recently, in *NLRB v. Indianapolis Power & Light Co.*,¹⁶⁵ the Board reversed its long line of case law in the

157. 624 F.2d at 1187.

158. 646 F.2d 1352 (9th Cir. 1981).

159. 243 N.L.R.B. 372 (1979).

160. 646 F.2d at 1369.

161. *Id.* at 1366.

162. *Id.* See 243 N.L.R.B. at 381.

163. 243 N.L.R.B. at 381.

164. See *supra* notes 126 & 131 and accompanying text.

165. 273 N.L.R.B. No. 211 (1985), 118 L.R.R.M. (BNA) 1201. In *Arizona Public Serv. Co.*, 273 N.L.R.B. No. 210 (1985), 118 L.R.R.M. (BNA) 1227, decided the same day as *Indianapolis Power & Light*, the Board concluded that an employer was free to suspend sympathy strikers, where the contract contained a broad no-strike clause, and a clause authorizing the employer to discipline those who engaged in unauthorized work stoppages. The Board did not address the question of whether the sympathy strike was prohibited by the no-strike

area. In the *Indianapolis Power & Light* case, the administrative law judge concluded that the employer violated the Act by suspending and threatening to discharge an employee who had honored a stranger picket line at the premises of the employer's customer.¹⁶⁶ The administrative law judge, following Board precedent, reasoned that because the contractual no-strike language did not expressly mention sympathy strikes, the contract would not bar them unless extrinsic evidence clearly showed the parties' intent to do so.¹⁶⁷ The administrative law judge examined the parties' bargaining history and found it insufficient to establish a sympathy strike waiver.¹⁶⁸

The Board reversed, announcing that it would now conclude that a broad no-strike clause bars employees from honoring stranger picket lines.¹⁶⁹ In reaching its conclusion the Board noted that although previous Board decisions had held that sympathy strikes were outside the scope of broad no-strike clauses, it could discern no logical or practical basis for the proposition that the prohibition of all "strikes" does not include sympathy strikes merely because the word "sympathy" is not used.¹⁷⁰ The Board concluded that if a contract prohibited strikes, it would read that prohibition as prohibiting all strikes, including sympathy strikes, unless the contract or extrinsic evidence established that the parties intended to exclude sympathy strikes from the rigors of the no-strike clause.¹⁷¹ In applying its new rule to the *Indianapolis Power & Light* facts, the Board thus concluded that no violation occurred by the employer's suspension of one employee and threats of discharge to others for their refusals to cross a stranger picket line.

In reviewing the *Indianapolis Power & Light* decision, it is necessary to recall the rationale for exempting sympathy strikes from a no-strike clause. The Supreme Court in *Buffalo Forge* discussed

clause but rather, reached its conclusion based on the fact that the union had specifically advised the employer by letter that it had not authorized the work stoppage, viewed in light of the contractual clause permitting discipline if a work stoppage were unauthorized.

166. *Indianapolis Power & Light*, 273 N.L.R.B. No. 211 at 1.

167. *Id.* at 2. The no-strike clause reads as follows:

The Union and each employee covered by the agreement agree not to cause, encourage, permit, or take part in any strike, picketing, sit-down, stay-in, slow-down, or other curtailment of work or interference with the operation of the Company's business, and the Company agrees not to engage in a lock-out.

Id.

168. *Id.*

169. *Id.*

170. *Id.* at 2-3.

171. *Id.* at 3.

this rationale.¹⁷² Simply put, a broad no-strike clause does not include a prohibition against sympathy strikes because the no-strike clause is the *quid pro quo* for an arbitration clause, and the sympathy strike is not an issue which can be arbitrated under the sympathy strikers' contract. The primary issue in *Buffalo Forge* involved whether a federal court could enjoin a sympathy strike pending the outcome of an arbitration concerning whether the strike was prohibited by the no-strike clause. It is nonetheless significant, however, that in *Buffalo Forge*, the Supreme Court warned that to the extent that other courts have assumed that a mandatory arbitration clause implies a commitment not to engage in sympathy strikes, they are wrong.¹⁷³ With the exception of the Seventh Circuit, the numerous Board and court opinions which have addressed the issue since *Buffalo Forge* have grounded their opinions upon that rationale, and have found sympathy strikes unlawful only by distinguishing their facts in reaching the conclusion that a clear and unmistakable waiver of the right to engage in a sympathy strike was present.¹⁷⁴

It is suggested that the prior Board decisions were a reasonable accommodation between employer and union: although the prior case law would not go so far as to conclude that a broad no-strike clause could prohibit sympathy strikes, the employer could accomplish this result with more specific contractual language¹⁷⁵ and/or evidence that the union had somehow waived its right to argue that the no-strike clause did not include a prohibition against sympathy strikes. Indeed, an employer could accomplish a waiver merely by forcing the issue at the bargaining table.

In its *Indianapolis Power & Light* decision, the Board gave no

172. See *supra* notes 111 & 113 and accompanying text.

173. See *supra* note 116 and accompanying text.

174. Only the Eighth and District of Columbia Circuits have taken the view that a broad no-strike clause, standing alone, can prohibit sympathy strikes. Both of these courts' decisions, however, were pre-*Buffalo Forge*. See *supra* notes 126 & 131 and accompanying text. The Seventh Circuit opinion in *Keller-Crescent* concluded that the Supreme Court's discussion of no-strike clauses as they affect sympathy strikes in an injunction setting was no longer viably read in deciding Board enforcement cases. *Keller-Crescent*, 538 F.2d at 1296.

175. Two commentators have stressed the importance of clear and concise language in no-strike clauses as a result of the Board's position in *W-I Canteen Serv.* See Stephens and Ledgerwood, *Do No-Strike Clauses Prohibit Sympathy Strikes?* 33 LAB. L.J. 294, 304 (1982). Another commentator has suggested that a uniform standard requiring explicit language in the contract to prohibit sympathy strikes would solve the problem of resorting to extrinsic evidence to decide the waiver question. See Rubin, *To Cross or Not to Cross: Picket Lines and Employee Rights*, 4 INDUS. REL. L.J. 419, 447 (1981).

consideration to the underlying rationale for the exemption of sympathy strikes from a broad no-strike clause as announced in *Buffalo Forge*. Rather, the Board concluded that it should reverse the administrative law judge only because it saw "no logical or practical basis" for the exemption of sympathy strikes from a no-strike clause.¹⁷⁶ Perhaps the Board's failure to address the underlying rationale for its prior holdings stems from its inability to effectively distinguish that rationale and the long line of cases which supported it.

The effect of the new Board ruling is that no employee, who is covered by a collective-bargaining agreement containing a no-strike clause, is going to take the chance of guessing whether his conduct in refusing to honor a stranger picket line will be protected. The Board's decisions prior to *Indianapolis Power & Light* places the burden of proving that a sympathy strike was included in the no-strike clause upon the employer; the *Indianapolis Power & Light* decision shifts that burden to the union. Consequently, this burden is shifted to the individual employee where, for example, the employee unexpectedly encounters a picket line at a delivery stop. Faced with the decision to cross or not to cross, it is likely that the employee will not take the chance of guessing that his conduct will be protected. As the Board previously noted in *W-I Canteen Service*:

The employees who were called upon during the early morning hours of May 10 to decide whether or not to cross the Teamsters picket at Rockford could benefit from none of these niceties of litigation and had at their disposal none of these aids [e.g., extrinsic evidence of bargaining history and conduct of the parties] to contract interpretation. Yet they had to stake their jobs on the correctness of their position.¹⁷⁷

Given the Board's short three-page opinion, it is difficult to speculate as to the Board's reasoning in overruling its prior holding.¹⁷⁸ Its impact, however, is clear—the employee's right to honor a stranger picket line will now be severely limited.

176. *Indianapolis Power & Light*, 273 N.L.R.B. No. 211 at 2-3.

177. *W-I Canteen Serv.* 238 N.L.R.B. at 617.

178. The Supreme Court has not spoken on the specific issue raised in *Indianapolis Power & Light*. The three-member Board panel that decided *Indianapolis Power & Light* are Reagan appointees who have effected a variety of significant changes in Board law since their appointments. These changes have been predominantly in favor of employers. Whether such changes will ultimately be adopted by the circuit courts and the Supreme Court cannot be predicted with certainty.

IV. CONCLUSION

The overall impact of *Pattern Makers* and *Indianapolis Power & Light* remains to be seen. There can be no doubt, however, that these decisions, taken together, will weaken the effectiveness of strikes as a means of applying economic pressure on employers to accede to union demands. As a result of these decisions, a union will no longer be able to count on its own members to refrain from resigning during the course of a strike. Of course, the inevitable fate of a strike without support is failure. Whether this is viewed as a necessary or unwarranted result depends upon one's view of unionism as a means for the betterment of working conditions. Knowing, however, that unions may no longer be able to call an effective strike, employers may use this opportunity to gain greater concessions at the bargaining table.

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